Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-340

ERNEST R. HAMILTON
CHARLES W. SCHUBERT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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August 28, 1978

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The petitioners, Ernest R. Hamilton and Charles W. Schubert, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 14,

1978, and for which petition for rehearing was denied on July 31, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, and the modifications of such opinion made in the order denying the petitions for rehearing, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 14, 1978. A timely petition for rehearing was denied on July 31, 1978, and this petition for certiorari is filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the closing argument of the prosecutor which sought to bolster the

credibility of the principal government witness, an unindicted co-conspirator, by suggesting that the grant of immunity under which he testified was a difficult process in which the determination to grant immunity was made independently by the judge, was improper and effectively denied petitioners a fair trial.

2. Whether petitioners were denied the right effectively to cross-examine and confront the principal prosecution witness, an unindicted co-conspirator who testified under a grant of immunity, by the trial court's refusal to permit questions dealing with the immunized witness' perception and knowledge of the criminal penalties he avoided by obtaining such immunity.

3. Whether the trial court and the Court of Appeals erred in their determination that the superintendent of the East Chicago Sanitary District was included in the classes of persons covered by the Indiana bribery statutes, and thus in permitting

and sanctioning consideration by the jury of alleged state law bribery violations as an object of the conspiracy charge and as proof of the mail fraud offenses.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The constitutional provisions involved are the due process clauses of the 14th and 5th Amendments to the United States Constitution, and the confrontation clause of the 6th Amendment to the United States Constitution.

2. The statutes involved are Indiana Code 35-1-90-4 and 31-1-101-9 which provide in pertinent part as follows:

IC 35-1-90-4:

> Whoever corruptly gives, promises or offer(s) . . . to any employee of any political subdivision of this state . . . any money or valuable thing or corruptly offers or promises to do any act beneficial to any such person, to influence his action, vote, opinion or judgment in any matter pending or that might legally come before him; and whoever

being . . . (an) employee of any political subdivision of this State, . . . either before or after his . . . qualification, appointment, or employment, solicits or accepts any such money, promise or valuable thing, to influence him with respect to his official duty, or employment, or to influence his action, vote, opinion or judgment in any matter pending or that might legally come before him, shall be . . . (guilty of an offense).

IC 35-1-101-9:

> Any person or agent who shall pay or agree to pay any money, bonus, fee, commission, or deliver or give anything of value in any sum to the value of more than two hundred dollars ($200) to any . . . person holding appointment or agency under the Constitution or any law of the State of Indiana, for the purpose of procuring any contract for the construction of any . . . public work, or the furnishing of any material or performance of any work for the use of said state, over which said official has any authority or jurisdiction or whoever whether in person or by agent or the agent himself, shall obtain any such contract and shall thereafter pay or agree to pay any such person or officer any money, bonus, fee, commission, percentage, reward, drawback, premium, profit or other thing of value in any sum to the value of over two hundred dollars ($200), . . . shall be (guilty of an offense).

STATEMENT OF THE CASE

Petitioners were charged in eight counts of a ten-count indictment. One of the eight counts was dismissed by the government at trial. Petitioners were convicted on the remaining seven counts and each received a sentence of seven years and a fine of $10,000.

One count under which petitioners were convicted charged conspiracy to commit offenses against the United States in violation of 18 U.S.C. § 371. The offenses alleged to be the objects of the conspiracy were (a) the use of the mails in furtherance of a scheme to defraud the East Chicago Board of Sanitary Commissioners and the citizens of East Chicago and to obtain money and property by means of false and fraudulent representations, in violation of 18 U.S.C. § 1341; and (b) traveling in interstate and foreign commerce and use of the facilities thereof

to promote, manage, establish and carry on bribery contrary to Indiana law, in violation of 18 U.S.C. § 1952.

Five substantive mail fraud counts incorporated all the factual allegations of the conspiracy count and charged five separate uses of the mails in furtherance of a scheme to defraud the East Chicago Board of Sanitary Commissioners and the citizens of East Chicago, and to obtain money and property by means of false representations, in violation of 18 U.S.C. § 1341.

The last count charged conspiracy to defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental function of the Internal Revenue Service in the ascertainment, computation, assessment and collection of income taxes, in violation of 18 U.S.C. § 371.

The first conspiracy charge and all of the mail fraud counts were based upon the legal premise that certain payments made to the superintendent of the East Chicago Sanitary District by an alleged co-conspirator of the petitioners constituted "bribes" within the reach of the Indiana criminal statutes cited above.

The prosecution's evidence concerning the alleged conspiracy, the "bribes" and the scheme to defraud was supplied principally by the unindicted co-conspirator, who personally made the payments in question, and who testified for the prosecution under a grant of immunity.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING QUESTIONS ABOUT THE PROPRIETY OF PROSECUTORIAL COMMENTS CONCERNING THE GRANTING OF IMMUNITY TO GOVERNMENT WITNESSES WHERE SUCH COMMENTS

ARE INTENDED TO OR HAVE THE EFFECT OF BOLSTERING THE CREDIBILITY OF THE WITNESS IN THE EYES OF THE JURY.

The process of granting immunity to a government witness is a simple one: If the United States Attorney makes a request for a grant of immunity, the Court must honor such request. 18 U.S.C. § 6003. In this case, the fact that immunity had been granted to the government's principal witness and its effect on his motivation for testifying was a thread which ran throughout the trial. In closing arguments, defense counsel appropriately asked the jury to weigh the credibility of the witness in the light of the immunity grant.

In responding to these arguments, the government prosecutor made the following comments:

> Now it's a problem. And I think we've, well, we've all lived through these last years, and

> there's a lot of controversy about immunities. It's no secret. It's a very difficult process. But how do you find out about crimes like this unless you grant someone immunity? Furthermore, as to the distastefulness of what we did, this immunity was granted by a Federal Judge upon petition of the Government. If there was something illegal or unethical about it, do you suppose it would have happened? Do you suppose you would have been here hearing Hernly's testimony? We know you wouldn't have, but the fact of the matter is, you did.
>
> * * *
>
> You can't ignore any of the testimony in this case. You've got to consider it all, weigh it all, weigh all the factors, and after you do that, if you find you absolutely can't believe somebody, then throw his testimony out. But the fact that he's been granted immunity is not a factor which will deny us the right to use a man's testimony, particularly when it's been granted by the Federal Judge as it has in this case.

These arguments plainly carry the suggestion that the government's witness was telling the truth because the trial judge had independently seen fit to grant him immunity. Such a suggestion is both inaccurate and misleading, and prosecutorial

comments of this kind have recently been condemned by the Seventh Circuit in United States v. Hollinger, 553 F.2d 535, 548 (7th Cir. 1977). Inexplicably, the Court of Appeals did not discuss this issue at all in its opinion. Since immunity grants are increasingly an important prosecutorial tool, it is essential that this court define and limit the extent of proper prosecutorial comment.

2. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN ALFORD V. UNITED STATES, 282 U. S. 687, 51 S.Ct. 218 (1931), AND DAVIS V. ALASKA, 415 U. S. 408, 94 S.Ct. 1105 (1974) IN THAT IT SANCTIONS THE TRIAL COURT'S LIMITATION OF THE CROSS-EXAMINATION OF THE PRINCIPAL GOVERNMENT WITNESS TESTIFYING UNDER A GRANT OF IMMUNITY AS TO HIS KNOWLEDGE AND PERCEPTION OF THE CRIMINAL PENALTIES HE AVOIDED BY OBTAINING IMMUNITY.

The right of full cross-examination is a constitutional right secured under the confrontation clause of the Sixth Amendment. In Davis v. Alaska, 415 U. S. 308, 315-316, 94 S. Ct. 1105, 1110 (1974) this court held that ". . . the exposure of the witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Although the trial court permitted full exploration of the facts and circumstances surrounding the grant of immunity to the witness, he refused to permit any inquiry whatever into the more significant question in terms of the witness' motivation, i.e. what criminal penalties did the witness believe he was facing when he determined to seek immunity, and what penalties did he believe he avoided by obtaining such immunity. The evidence showed that as early as three years before any government agent

contacted the witness, he had consulted with attorneys who made a legal analysis of the possible criminal violations the witness faced as a result of his activities. In the face of this evidence, the trial court nonetheless refused to permit cross-examination as to the criminal penalties the witness believed he faced but for the immunity grant. This court ought to consider whether such a limitation constitutes a denial of the constitutional right of confrontation.

3. THE DECISION BELOW INCORRECTLY HAS DECIDED AN IMPORTANT STATE QUESTION AS TO WHAT CONSTITUTES A "BRIBEABLE OFFICIAL" UNDER INDIANA STATE LAW.

The Indiana bribery statutes enumerate the classes of persons to whom they apply. In this case the crux of the issue as to the applicability of the Indiana statutes was whether or not a sanitary district, denominated a "special taxing district" under Indiana law, was a "political sub-division". In the face of clear precedents

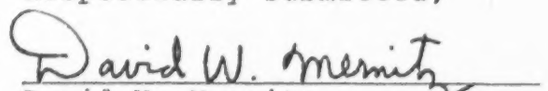
indicating that a sanitary district was not "a political subdivision" under Indiana law and that the superintendent of a sanitary district was therefore not an "employee of a political subdivision", the Court of Appeals held that the Indiana bribery statutes could nevertheless furnish the state-law-violation predicate for the conspiracy and mail fraud charges.

The consequence of this determination was that a state statute of doubtful applicability was used as the object of an interstate travel violation (18 U.S.C. § 1952) which was in turn used as the object of a conspiracy charge. (18 U.S.C. § 371). This court ought to consider whether such an inverted pyramid of charges satisfies the constitutional requirement that criminal statutes must give fair notice of prohibited conduct.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,



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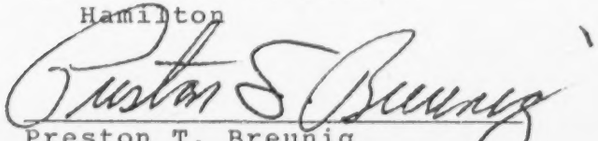

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August, 1978, three copies of the Petition for Writ of Certiorari were served on the Solicitor General by depositing in a United States post office, with first class postage prepaid addressed to the Solicitor General, Department of Justice, Washington, D. C. 20530.

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APPENDIX

JUN 16 1978

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 77-1524, 77-1525, 77-1554, 77-1555 and 77-1563

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES FITZGERALD, ALFRED KOVACH, CORNEL LEAHU, CHARLES W. SCHUBERT, and ERNEST HAMILTON,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. H Cr 76 114—Phil M. McNagny, Jr., *Judge.*

ARGUED APRIL 10, 1978—DECIDED JUNE 14, 1978

Before CUMMINGS and WOOD, *Circuit Judges,* and SOLOMON,* *District Judge.*

SOLOMON, *Judge.* Appellants Fitzgerald, Schubert, Hamilton, Kovach, and Leahu were charged in Count 1 with a conspiracy to use the mails in furtherance of a scheme to defraud the East Chicago, Indiana, Board of Sanitary Commissioners (Board) and the citizens of the East Chicago Sanitary District (District). Other objects

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* Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

of the conspiracy were to obtain money and property through false representations and to use the facilities of interstate and foreign commerce to promote and carry on bribery contrary to Indiana law. Fitzgerald, Schubert, Hamilton, and Leahu were charged in Counts 2 to 6 with separate uses of the mails to further the scheme to defraud. They were charged in Count 8 with conspiracy to defraud the United States by obstructing the Internal Revenue Service (IRS) in the computation, assessment, and collection of taxes. Kovach was also charged with perjury before the grand jury.

After an eight-week jury trial in which none of the appellants testified, the jury convicted all appellants of all charges brought against them. On appeal, they raise a number of issues. We affirm.

I

This case involves the unlawful taking by public officials, contractors, and others of more than two million dollars ($2,000,000) from a public works project.

At the trial, the government proved that Hamilton and Schubert were the directors of RSH, Inc., an architectural, engineering, and consulting service. RSH was under contract to the Board to design an estimated fifteen million dollar sewer project (the project) to be financed by public bonds. Hamilton and Schubert recommended to the Board which bid to accept and supervised the construction. Leahu was the Superintendent of the Board. He was appointed to that position by the mayor of East Chicago. Leahu gave final approval of the bid award and all changes in the work on the project.

Kovach, a friend of Leahu's, was an East Chicago storeowner with many political connections. He was formerly an assistant to the mayor of East Chicago.

Hernly[1] was the president and director of Hernly Brothers, Inc., a construction company which was

[1] Hernly testified for the government and received immunity.

awarded the bid. Fitzgerald was the director of Fitzgerald and Stutz, Inc., a construction company which formed a joint venture with Hernly Brothers to complete the project.

Wetterlin owned a business which designed and sold engineer control systems. Hinesley was a manufacturers' representative for firms which constructed waste-water treatment equipment.[2]

BID DISCUSSIONS

The bids on the project were due on September 22, 1969. Between June and September, 1969, Hamilton, Schubert, Hernly, Wetterlin, and Fitzgerald met at least four times. They discussed Hernly Brothers' proposed bid and made a number of changes in it. They agreed that each would receive one-fifth of the project's profits, and, in return for their shares, Hamilton and Schubert would recommend that the Board accept Hernly Brothers' bid.

The group also discussed a method to secretly divide the profits and avoid income taxes (the Wetterlin plan). Wetterlin suggested that Hernly Brothers should enter into spurious consulting contracts with a foreign corporation, send money overseas as payments on the contracts, and deduct the payments as business expenses. They would then retrieve the money and divide it, free of income taxes. Hamilton and Schubert later traveled to Europe to investigate its feasibility.

PALMER HOUSE MEETING

Hernly and Wetterlin met with appellants at the Palmer House in Chicago on either September 20 or 21, 1969. This was a day or two before submission of Hernly Brothers' bid. Leahu said that he had called the meeting to "see how $1 million that was needed for East Chicago officials would be handled. . . ."[3]

[2] Wetterlin entered into a plea agreement, and Hinesley entered a plea of guilty.

[3] What other "East Chicago officials" were involved is unclear. The record demonstrates that Leahu received the money, but not whether he gave any of it to other officials.

Hamilton suggested the Wetterlin plan as a method of hiding a million dollars. Kovach and Leahu discussed the Wetterlin plan privately and then announced that the Wetterlin plan would be used. Appellants agreed that one million dollars would be paid to Leahu for "the East Chicago officials". In return, Hernly Brothers would be awarded the bid on the project.

Hernly was concerned about taxes on the million dollar bribe. He wanted to have another million collected to cover taxes on the first million if the IRS discovered it. Appellants agreed that the Wetterlin plan could be used to hide the second million.

Appellants also agreed to use "change orders" to generate at least the amount necessary for the bribe and tax money. The change orders were to be made in the project specifications, signed by Hamilton or Schubert, which either deleted or added items to the project. Hamilton or Schubert were to inflate the value of the additions and deflate the value of the deletions. This would produce hidden profits.

Hamilton, Schubert, Wetterlin, and Fitzgerald agreed that Hinesley would receive a $200,000 commission, the amount he lost when the parts he was to supply were deleted. Hinesley was to be placed on the Fitzgerald and Stutz payroll and paid through false invoices. Hinesley did no work for this money.

BID AWARD AND FRAUDULENT PERFORMANCE BOND

Hernly Brothers and the other bidders submitted their bids on September 22, 1969. On the following day, Hamilton and Schubert recommended to the Board that Hernly Brothers' bid be accepted. The Board tentatively awarded the contract to Hernly Brothers, on condition that Hernly obtain a suitable performance bond.

Hernly was unable to obtain a performance bond. He told this to Leahu and wanted to withdraw his bid, but he was persuaded by Leahu to let Leahu and Kovach obtain the bond. Leahu and Kovach obtained a blank Underwriters Insurance Company bond and, with

Hamilton's help, they completed it, using forged signatures. The Board accepted the fraudulent bond, and the insurance agent who provided the bond received $143,573.14 for his efforts.

Hernly Brothers was given the final award in early January 1970, and shortly thereafter formed the joint venture with Fitzgerald and Stutz.

FORMATION OF ITAG

In January 1970, Hamilton, Fitzgerald, Schubert, Wetterlin, and Hernly went to Switzerland to carry out the Wetterlin plan. They met officials of a Swiss accounting firm, Allgemeine Treuhand (Allgemeine), and agreed that Allgemeine would acquire the stock of Ingenieur Tiefbau A.G. (ITAG), a dormant Swiss corporation. The stock was divided into five equal shares and transferred in trust to Allgemeine. Allgemeine was to enter into consulting, purchase, and rental agreements on behalf of ITAG for minimum payments to ITAG of three million dollars.

Hamilton, Schubert, Wetterlin, Hernly, and Fitzgerald signed a separate agreement which provided that each of them was entitled to an equal share of ITAG stock.

In February 1970, Hernly Brothers contracted with ITAG for ITAG to provide consulting services for $80,000 a month. Project funds were used to pay the fee to ITAG, but ITAG provided no services. In June 1970, Hernly and Schubert contracted with ITAG for the rental of sheet welding equipment at $35,000 a month for twenty months. Some equipment was shipped to East Chicago but never used. Project funds again supplied the rental fee.

From February 1970, until November 1971, Hernly Brothers paid about $2.3 million to ITAG out of project funds generated mainly through the fraudulent use of change orders. The cash was usually carried by hand to Zurich; checks were either hand-carried or mailed.

From February 1970, until June 1971, Hernly, Hamilton, Schubert, Fitzgerald, and Wetterlin re-

trieved from ITAG in Switzerland one million dollars which was paid to Leahu. In November 1971, Hinesley retrieved $35,000 from ITAG, out of which he paid $25,000 to Schubert. In October 1971, in Zurich, Hamilton received an ITAG accounting, and in January and February 1972, Hernly mailed letters to ITAG which stated that Hernly Brothers' intended to pay ITAG $20,000 and $30,000 to complete the contracts. The Swiss connection was shut down in early 1972.

COLUMBINE I AND DIVISION OF PROFITS

The net "profit" on the project exceeded six million dollars. Hamilton and Schubert wanted to receive their shares tax-free or at a reduced tax rate and suggested investing the profits in oil properties. In April 1971, Fitzgerald and Stutz and Hernly Brothers formed a joint venture with BESSI, a Denver-based investment firm. The joint venture was called Columbine I, and it was formed to transfer profits from Hernly Brothers to Hamilton and Schubert. Hernly Brothers and Fitzgerald and Stutz (the limited partners) contributed $3.2 million of project profits to BESSI (general partner) for investment for exploring and developing oil producing properties. Forty percent of the profit from the investments was to be paid to Hamilton and Schubert for their one-fifth shares of the sewer project profits.

In January 1972, Hamilton and Schubert sold their interests in Columbine I to BESSI in exchange for promissory notes valued at $1,090,930 each. In December 1972, BESSI filed a petition in bankruptcy. Hamilton and Schubert compromised their claims against it for about $75,000.

Wetterlin did not receive any of his share of the sewer project profits.

PROGRESS ON THE PROJECT AND ITS COMPLETION

Hamilton and Schubert authorized five change orders before June 30, 1971, when the project was substantially

completed, and later they authorized a sixth change order. The second and fifth change orders, signed and approved by Hamilton, generated most of the two million dollar bribe and tax money.

After June 30, 1971, except for the sixth change order, Hernly Brothers and Fitzgerald and Stutz did only maintenance work on the project. The sixth change order, completed in August 1973, substituted other work for nineteen uncompleted items. The contractors received no additional money for this work.

II

CONTENTIONS

One or more of the appellants raise the following specifications of error: (1) there was a fatal variance between the indictment and the evidence in Count 1, where the proof showed a number of minor conspiracies rather than one overall conspiracy as alleged; (2) the statute of limitations ran on Counts 1 through 6; (3) Leahu was not a "bribeable official" under Indiana law; (4) co-conspirators' out-of-court statements were erroneously admitted into evidence; (5) the cross-examination of Hernly was erroneously limited; and (6) appellants were prejudiced because the court misinformed counsel of its action on requested jury instructions.

III

SINGLE CONSPIRACY

The plan of action and the agreements entered into by Wetterlin and Hernly and all of the appellants at the Palmer House meeting established a basis for the jury to find one overall conspiracy. At that meeting the parties agreed: (1) that Leahu would receive a million dollar bribe in breach of his fiduciary duties to the Board and District; (2) that Hamilton and Schubert would breach their duty to protect the Board's and District's interests in the performance of the project by, among other things, dividing the profits with the general contractor;

and (3) that the Wetterlin plan would be used to hide money and avoid taxes.

This was a complex conspiracy which included minor or subsidiary agreements, each one of which involved some but not all of the conspirators. It is immaterial that each of the appellants did not participate in all the activities or even know all the details of the conspiracy. *Blumenthal v. United States*, 332 U.S. 539, 557-58 (1947); *United States v. Hickey*, 360 F.2d 127, 138 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); *United States v. Bastone*, 526 F.2d 971, 981 (7th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976). They are bound as long as the results fall within the common purposes of the conspiracy and appellants knowingly contributed toward its furtherance. *United States v. Greer*, 467 F.2d 1064 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973). As in *Blumenthal*, each subsidiary agreement here was a step in the formation of a larger conspiracy with common goals.

STATUTE OF LIMITATIONS

Kovach and Leahu contend that their prosecution is time-barred because they were indicted on September 30, 1976, which was more than five years after the bribery conspiracy had been completed. The other appellants contend that the overt acts within the limitations period relate only to ITAG transactions, BESSI transactions, and the final change order—none of which had "any relationship . . . to the core fraud against the Sanitary District."

These contentions are based on the assumption that there were a number of separate conspiracies or that the objects of the conspiracy were entirely separable and distinct. We have already rejected those contentions.

The applicable statute of limitations for the crimes charged in Counts 1 through 6 is five years. 18 U.S.C. § 3282. There were a number of overt acts which took place within the limitations period. The jury could have reasonably found that any of these acts were in furtherance of the conspiracy. These include:

1. *The continued use of ITAG.* On November 5, 1971, Hinesley, pursuant to an authorization for release of ITAG funds, traveled to Switzerland and received $35,000, $25,000 of which he paid to Schubert. He kept the remaining $10,000 as part of his "commission". Several months later Hernly sent letters to ITAG which terminated the consulting contract.

The Wetterlin plan and the ITAG structure were necessary to hide the money. Without them it would have been difficult to hide or pay the bribe money and the tax money or to share the profits with Hamilton and Schubert. This complicated system of concealment was a part of appellants' agreements from the beginning.

The jury could reasonably conclude that these acts of concealment were "done in furtherance of the *main* criminal objectives of the conspiracy." *Grunewald v. United States*, 353 U.S. 391, 405 (1957).

2. *Columbine I.* In 1971 the Columbine I joint venture was formed by Fitzgerald and Stutz and Hernly Brothers with BESSI. This was the vehicle by which Hamilton and Schubert were to receive their shares of the profits. During 1971 and 1972, Hamilton and Schubert received approximately $30,000 from the Columbine I investments. In December 1972, they received about $75,000 in compromise of their bankruptcy claims.

LEAHU WAS A "BRIBEABLE OFFICIAL"

The use of interstate and foreign commerce facilities to carry on bribery in violation of Indiana law was one of the objects of the conspiracy. Appellants contend that they could not have conspired to bribe Leahu because he was not a "bribeable official" under Indiana law. Ind. Code §§ 35-1-90-4, 35-1-101-9 (1971) (repealed 1977). Section 35-1-90-4 made it unlawful to bribe any "employee of a political subdivision of [Indiana]." Section 35-1-101-9 made it unlawful to bribe any person holding "any lucrative office, or appointment or agency under the Constitution or any law of the State of Indiana for the purpose of procuring [a] public contract. . . ."

Appellants contend that because an Indiana sanitary district is not a municipal corporation for the purpose of the state constitution's two percent tax limitation provision, it is not a political subdivision under section 35-1-90-4. There is no merit in this contention. Neither is there merit in appellants' contention that Leahu's position as sanitary district superintendent was not a "lucrative office, appointment or agency" within section 35-1-101-9 because sanitary board superintendent is not a "lucrative office or appointment" within the meaning of Art. 2, § 9 of the Indiana Constitution.

The Indiana legislature did not intend to create an entity separate from municipalities when it created sanitary districts. *See Archer v. City of Indianapolis*, 233 Ind. 640, 122 N.E.2d 607, 610-11 (1954). Like the chief of police and other department heads appointed by the mayor, Leahu was a public officer and an employee of the municipality. *See State v. Carey*, 241 Ind. 692, 175 N.E.2d 354 (1961); *Klink v. State ex rel. Budd*, 207 Ind. 628, 194 N.E. 352 (1935); *Archer, supra.* As such, he was a bribeable official under Indiana law.

ADMISSION OF CO-CONSPIRATORS' OUT-OF-COURT STATEMENTS

Appellants contend that out-of-court statements made by Fitzgerald to Price Waterhouse & Co. auditors were improperly admitted.

In 1972, after the formation of Columbine I, BESSI proposed an SEC registration. Price Waterhouse & Co. was requested to make an audit which included a five-year earnings history of Hernly Brothers and Fitzgerald and Stutz. Over appellants' objections, Price Waterhouse employees were permitted to testify about statements made to them by Fitzgerald during the audit.

Price Waterhouse employees testified that Fitzgerald told them that:

1. Legal fees paid under the table to assure there would be no trouble with the municipal bonds were a "cost of doing business";

2. A politician told him where to secure the performance bond;

3. The Columbine I profits distributed to Hamilton and Schubert was a "stupid mistake", having nothing to do with the project;

4. He (Fitzgerald) had no ownership interest in ITAG, and the ITAG contracts were negotiated by unrelated parties;

5. The large profit on the project was generated by service and a machine from ITAG, a good economic situation, and earlier completion than expected; and

6. The project had received engineering services from ITAG.

The court instructed the jury that it could consider this testimony against all defendants named in Count 8, but only against Fitzgerald in Count 1.

Appellants argue that these statements were inadmissible hearsay because they were not made during the course of or in furtherance of the conspiracy. They assert that Fitzgerald made the statements to cover up after the Count 1 and Count 8 conspiracies had achieved their main goals. *Grunewald, supra,* 353 U.S. at 405.

Fitzgerald's statements as they relate to Count 1 were admitted against him only, and the jury was so instructed. The limitation was more than appellants were entitled to because from this and other evidence, the jury was entitled to conclude that they were made in furtherance of the Count 1 conspiracy.

Count 8 charged that appellants (with the exception of Kovach) conspired to defraud the IRS by reporting ITAG payments and personal expenses as business expenses on the 1970, 1971, and 1972 partnership tax returns for the Hernly Brothers-Fitzgerald and Stutz joint venture. In our view, there is a sufficient basis to find Fitzgerald's statements were made in furtherance of this conspiracy.

Nevertheless, even if it was error to admit them, the error was harmless. The existence of the Count 8 con-

spiracy and each conspirator's involvement was established by overwhelming evidence. Fitzgerald's statements added nothing substantial, and their effect was minimal in the light of all of the other evidence. *United States v. Smith*, 550 F.2d 277, 282 (5th Cir. 1977); *United States v. Williams*, 548 F.2d 228, 232 (8th Cir. 1977).

LIMITATION ON THE CROSS-EXAMINATION OF HERNLY

Appellants contend that their sixth amendment confrontation rights were violated because their cross-examination of Hernly was limited.

In September, 1972, Hernly retained an attorney to advise him on his criminal liability from transactions with his co-conspirators.

In July, 1975, the government granted Hernly immunity, and shortly thereafter he was interviewed by Justice Department lawyers.

On cross-examination, Schubert's counsel asked Hernly:

> "Did Mr. Tabbert [the attorney] advise you as to what criminal penalties you were facing?"
>
> "Did you know in 1972 and 1973 what criminal penalties you were facing?"
>
> "Why did you make an agreement with the government?"
>
> "Was the number of years that you could possibly get in prison ever discussed with you?"

The government objected to each question, and each objection was sustained. Appellants contend that this limitation on their cross-examination violated their confrontation rights because they were not allowed to fully demonstrate Hernly's bias.

A defendant may not be deprived of the right of "effective" cross-examination when he is attempting to show bias on the part of a government witness. *Davis v. Alaska*, 415 U.S. 308, 318 (1974). But a trial court has

wide discretion to limit cross-examination, particularly when further cross-examination into the witness' subjective thoughts would not be meaningful because of previous testimony revealing the witness' bias. *Bastone, supra*, 526 F.2d at 981.

The question is whether the jury had sufficient information to make a discriminating appraisal of the witness' motives and bias. *United States v. Campbell*, 426 F.2d 547, 550 (2d Cir. 1970).

Hernly testified for eleven days. He was exhaustively cross-examined on: his receipt of immunity; subsistence and expense payments from the government; his personal and corporate liability for civil tax assessments and fraud penalties; his tax liability, as well as that of his brothers; the attempts he made to get immunity for his Swiss associates; and his remaining interests in ITAG and BESSI.

The jury had ample information on Hernly's receipt of immunity and the benefits he derived from immunity. The court did not abuse its discretion when it sustained objections to these four questions.

MISINFORMING COUNSEL OF COURT'S ACTION ON REQUESTED JURY INSTRUCTIONS

Appellants contend they were deprived of the opportunity to make effective jury arguments on the statute of limitations issue because the court misinformed them on the instructions it proposed to give on that subject.

The court held three instruction conferences. During the conference held after counsel's arguments to the jury, the court modified its previous position. It informed counsel that it would give Hamilton's requested instruction on concealment and its own instruction on the statute of limitations.

This was a complex eight week trial. There were two conspiracy counts and six substantive counts. Many witnesses testified, and many exhibits were admitted. The court ordered the parties to submit their requested jury instructions no later than one week before the trial. Only the government complied.

After two weeks of trial, the court again requested instructions, and noted that the case was very complicated. Three defendants submitted their proposed instructions one week later. The instructions in issue here were submitted by Hamilton about nine weeks after they were ordered to be filed, five weeks after the court again requested them and one day before final arguments.

If requests for jury instructions are to be of real help to the trial court, they must be filed early enough to enable the court to fully consider them. Here the court had no such opportunity because the requests were not timely filed. It would not have been error for the court to have rejected them. *United States v. Tourine*, 428 F.2d 865 (2d Cir. 1970), *cert. denied sub nom. Burtman v. United States*, 400 U.S. 1020 (1971).

Appellants contend that if the court had informed them earlier that it would give these instructions, they would have argued the case differently. Even if that were true, appellants' own failure to timely file their requests was largely responsible for the situation about which they now complain. But the record shows that counsel fully argued the issues relating to the statute of limitations and concealment, the matters covered by the instructions. There was no prejudice here. *United States v. Pommerening*, 500 F.2d 92 (10th Cir.), *cert. denied*, 419 U.S. 1088 (1974).

OTHER ISSUES

We have studied all of the other claims of error. None of them have merit, and most of them are frivolous. The appellants had fair trials and the jury's verdicts were based on evidence establishing their guilt beyond all reasonable doubt.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 31, 1978

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Gus J. Solomon,* Senior District Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 77-1524, 77-1525, 77-1554, 77-1555 and 77-1563 vs. CHARLES FITZGERALD, ALFRED KOVACH, CORNEL LEAHU, CHARLES W. SCHUBERT, and ERNEST HAMILTON, Defendants-Appellants.	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA HAMMOND DIVISION No. H CR 76 114 Phil M. McNagny, Jr.

ORDER

Appellants filed petitions for rehearing calling attention to errors which were

*The Hon. Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

inadvertently included in the Court's opinion dated June 14, 1978.

To correct those errors, IT IS ORDERED that the opinion be amended as follows:

1. Delete from page 2: "He was appointed to that position by the mayor of East Chicago."

2. Delete, beginning on page 10, the paragraphs which start with "Appellants contend that because an Indiana sanitary district . . ." and "The Indiana legislature did not intend to create . . .".

3. Insert, in the place of the two paragraphs deleted beginning on page 10, the following:

"Appellants contend that because an Indiana sanitary district is not a municipal corporation within the meaning of the two percent tax limitation provision of the Indiana State Constitution, Leahu as Superintendent was not an employee of a political subdivision. There is no merit in this contention.

"In Archer v. City of Indianapolis, 233 Ind. 640, 122 NE.2d 607, 610-611 (1954) the Court held that sanitary district bonds payable out of a special tax did not create indebtedness of the municipality served by the sanitary district. Nevertheless, the Court observed that the sanitary district functioned as an agency of the city. The sanitary district is under the control of a Board whose members are appointed and subject to removal by the mayor. The Board acts in the name of the City when it brings or defends an action and when it issues bonds.

"We hold that as an employee of the Board, Leahu was an employee of the City and therefore a bribeable official under Indiana law."

The petitions for rehearing are otherwise denied.

On appellant Kovach's suggestion for rehearing en banc, no judge in active service has requested a vote thereon, and the judges on the original panel have voted to deny a rehearing.

IT IS THEREFORE ORDERED that the suggestion for a rehearing en banc is rejected and the petitions for rehearing are denied.

The application to stay the mandate is denied, and the mandate shall issue forthwith.

Supreme Court, U. S.
FILED
NOV 9 1978
MICHAEL RODAK, JR., CLERK

Nos. 78-340, 78-5313, 78-396 and 78-398

In the Supreme Court of the United States

OCTOBER TERM, 1978

ERNEST R. HAMILTON AND CHARLES W. SCHUBERT, PETITIONERS

v.

UNITED STATES OF AMERICA

CORNEL LEAHU, PETITIONER

v.

UNITED STATES OF AMERICA

CHARLES C. FITZGERALD, PETITIONER

v.

UNITED STATES OF AMERICA

ALFRED KOVACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-340

ERNEST R. HAMILTON AND CHARLES W. SCHUBERT, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 78-5313

CORNEL LEAHU, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-396

CHARLES C. FITZGERALD, PETITIONER

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No. 78-398

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 579 F.2d 1014.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1978. Timely petitions for rehearing were denied on July 31, 1978 (Pet. App. A15-A18). The petitions for a writ of certiorari in No. 78-340 and 78-5313 were filed on August 29, 1978, and August 30, 1978, respectively. The petitions for a writ of certiorari in Nos. 78-396 and 78-398 were filed on September 8, 1978. Extensions of time within which to file those petitions were granted until that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence at trial showed that petitioners were engaged in multiple conspiracies rather than a single conspiracy (Petitioners Leahu and Kovach).

2. Whether the district court committed reversible error in refusing to sever petitioners Kovach's and Fitzgerald's trial from that of their co-defendants.

3. Whether the evidence showed the mailings involved in the counts charging mail fraud (Count II-VI) were in furtherance of the scheme to defraud.

4. Whether petitioner Leahu's convictions for conspiracy and mail fraud (Counts I-VI) and petitioner Kovach's conviction for conspiracy were barred by the statute of limitations.

5. Whether the district court improperly limited petitioners Fitzgerald's, Hamilton's, and Schubert's right to cross-examination when it refused to allow them to inquire into the nature of the charges a witness believed he was facing at the time he was granted immunity to testify.

6. Whether certain comments by the prosecutor during closing argument were improper (Petitioners Hamilton and Schubert).

7. Whether the courts below erred in determining that petitioner Leahu was a "bribeable official" under Indiana State law for purposes of charging that one of the objects of the conspiracy alleged in Count I was to violate the Indiana bribery statutes (Petitioners Hamilton, Schubert, Fitzgerald, and Leahu).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, each petitioner was convicted of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371 (Count I). In addition, petitioners Hamilton, Schubert, Fitzgerald, and Leahu were convicted of five substantive counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts II-VI), and conspiracy to frustrate an Internal Revenue Service investigation, in violation of 18 U.S.C. 371 (Count VIII).[1] Petitioner Kovach was also con-

[1] Count VII charging petitioners Hamilton, Fitzgerald, Schubert, and Leahu, with bribery, in violation of 18 U.S.C. 1952, was dismissed on motion of the government at the close of its case in chief.

victed of committing perjury before a grand jury, in violation of 18 U.S.C. 1623 (Count IX). Petitioners Hamilton, Schubert, Fitzgerald, and Leahu were each sentenced to seven concurrent terms of five years' imprisonment on Counts I-VI and VIII and fined $10,000 on Count I. Petitioner Kovach was sentenced to two concurrent terms of five years' imprisonment on Counts I and IX and fined $10,000 on Count I. The court of appeals affirmed in a comprehensive opinion, on which we basically rely (Pet. App. A1-A14).[2]

The facts are fully summarized in the opinion of the court of appeals (Pet. App. A1-A14). Petitioners engaged in an elaborate scheme to defraud the East Chicago Indiana Board of Sanitary Commissioners of more than two million dollars and of the loyal services of public officials, and to obstruct the Internal Revenue Service in the computation, assessment, and collection of taxes. Bids on the approximately fifteen million dollar Indiana sewer project were due on September 22, 1969. Shortly before that date, petitioners Hamilton and Schubert, directors of the architectural, engineering, and consulting firm of Russell, Schubert, and Hamilton, Inc., which was under contract with the Board to design the project, met at least four times with Miles Hernly, President and Director of Hernly Brothers, Inc., a Parker, Indiana construction company; Melvin Wetterlin, owner of a business which designed and sold engineering control systems; and petitioner Fitzgerald, Director of Fitzgerald and Stutz, Inc., another construction company. At these meetings the parties discussed and made changes in the Hernly Brothers' proposed bid on the project. They agreed that Fitzgerald and Stutz would enter into a joint contract with Hernly to complete the project and that the profits would be divided into five equal shares—Hamilton and Schubert to receive two of the shares for recommending to the Board that it accept the Hernly Brothers bid, and Hernly, Wetterlin, and Fitzgerald, to receive the three other shares. To conceal their profits and avoid income taxes they agreed to a scheme devised by Wetterlin (the Wetterlin Plan) whereby Hernly Brothers would enter into spurious consulting contracts with a foreign straw corporation through which the illicit profits would be funnelled as alleged payments on the contracts and deducted as business expenses, thus enabling the conspirators to retrieve and divide the money free of income taxes.

About September 20, 1969, two days before bids on the project were due for submission to the Board, petitioners Hamilton, Schubert, Fitzgerald, and coconspirators Hernly and Wetterlin met at the Palmer House in Chicago, with petitioner Leahu, Superintendent of the Board, and petitioner Kovach, an East Chicago store owner with political connections. At this meeting Leahu and Kovach indicated they would need one million dollars to pay "East Chicago officials" in order to assure that Hernly Brothers were awarded the contract. The parties also agreed to utilize the Wetterlin Plan to hide their profits and

[2] "Pet. App." refers to the appendix to the petition in No. 78-340.

conceal the bribe. They furthermore resolved to use the Wetterlin Plan to conceal another million dollars in order to cover the possibility of having to pay taxes on the first million dollars if the IRS discovered it. Finally, they agreed to place co-defendant Lawrence Hinesley, a manufacturer's representative for firms involved in the sale of waste-water treatment equipment, on the Fitzgerald and Stutz payroll and pay him for false invoices submitted on the project in order to compensate him for loss of his commission for sales of lift stations due to deletion of the stations from the Hernly Brothers bid.

The Board awarded the contract to Hernly Brothers on September 23, 1969. Shortly thereafter, Hamilton, Fitzgerald, Wetterlin, Hernly, and Schubert traveled to Europe to carry out the Wetterlin Plan. They retained the Zurich, Switzerland accounting firm, Allgemeine-Treuhand (Allgemeine) to make the necessary arrangements. Allgemeine acquired the stock of Ingenieur Tiefbau A.G. (ITAG), a defunct corporation, divided its stock into five equal shares among Hamilton, Schubert, Wetterlin, Hernly, and Fitzgerald, and transferred the stock in trust to Allgemeine. The Board gave final approval to the contract in early January 1970, after Leahu and Kovach obtained a fraudulent performance bond for Hernly, who was unable to obtain a bona fide bond. Fitzgerald and Stutz then formed the joint venture with Hernly Brothers that they had agreed upon earlier.

Between February 1970 and November 1971 Hernly Brothers paid over two million dollars to ITAG from project funds through fraudulent use of change orders.[3] From February 1970 until June 1971, Hernly, Hamilton, Schubert, Fitzgerald, and Wetterlin retrieved one million dollars from ITAG and paid it to Leahu. Although Hinesley performed no work, he was placed on Fitzgerald and Stutz's payroll and paid through false invoices submitted on the project. The remainder of the illicit profits was split in equal shares among Hamilton, Schubert, Wetterlin, Fitzgerald and Hernly. In November 1971, Hinesley retrieved $35,000 from ITAG, out of which he paid $25,000 to Schubert. In October 1971, in Zurich, Hamilton received an ITAG accounting, and in January and February 1972, Hernly mailed letters to ITAG which stated that Hernly Brothers' intended to pay ITAG $20,000 and $30,000 to complete the contracts. The Swiss connection was shut down in early 1972.

The net "profit" on the project exceeded six million dollars. Hamilton and Schubert wanted to receive their shares tax-free or at a reduced tax rate and suggested investing the profits in oil properties. In April 1971, Fitzgerald and Stutz and Hernly Brothers formed a joint venture with BESSI, a Denver-based investment firm. The joint venture was called Colum-

---

[3] The change orders were documents of the engineers reflecting changes in the original plans and specifications and requiring either additional expenditures or revision of certain expenditures.

bine I, and it was formed to transfer profits from Hernly Brothers to Hamilton and Schubert. Hernly Brothers and Fitzgerald and Stutz (the limited partners) contributed $3.2 million of project profits to BESSI (general partner) for investment for exploring and developing oil producing properties. Forty percent of the profit from the investments was to be paid to Hamilton and Schubert for their one-fifth shares of the sewer project profits.

In January 1972, Hamilton and Schubert sold their interests in Columbine I to BESSI in exchange for promissory notes valued at $1,090,930 each. In December 1972, BESSI filed a petition in bankruptcy. Hamilton and Schubert compromised their claims against it for about $75,000.

ARGUMENT

1. Petitioners Leahu (78-5313 Pet. 12-17), Fitzgerald (78-396 Pet. 8-12), and Kovach (78-398 Pet. 10-18) contend that the proof at trial showed the existence of multiple conspiracies to defraud rather than a single conspiracy as charged. Petitioners Leahu and Kovach argue that the evidence demonstrated they participated only in the bribery aspect of the scheme, which they maintain commenced with the Palmer House meeting in Chicago and ended in June, 1971, when Leahu was given the final installments on the $1,000,000 bribe by their co-conspirators. Petitioner Fitzgerald does not explain the nature of the variance he claims.

Petitioners' contentions were answered by the court of appeals (Pet. App. A8) when it stated:

> This was a complex conspiracy which included minor or subsidiary agreements, each one of which involved some but not all of the conspirators. It is immaterial that each of the appellants did not participate in all the activities or even know all the details of the conspiracy. *Blumenthal* v. *United States*, 332 U.S. 539, 557-58 (1947); *United States* v. *Hickey*, 360 F.2d 127, 138 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); *United States* v. *Bastone*, 526 F.2d 971, 981 (7th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976). They are bound as long as the results fall within the common purposes of the conspiracy and appellants knowingly contributed toward its furtherance. *United States* v. *Greer*, 467 F.2d 1064 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973). As in *Blumenthal*, each subsidiary agreement here was a step in the formation of a larger conspiracy with common goals.

The evidence showed not only that petitioners participated in the Palmer House meeting with Schubert, Wetterlin, and Hernly to discuss bribing state officials (Tr. 879-880), but that petitioners were present during the discussions about how the cash should be generated (Tr. 3019-3020), including discussions about use of change orders (Tr. 2948), laundering money through Switzerland, returning it in tax free cash (Tr. 82), and sending an additional million dollars Leahu and Kovach indicated they needed to effect the bribery (Tr. 2949). In fact, Leahu was told

by Hernly after the meeting in Switzerland, in which petitioner Fitzgerald participated and at which ITAG was set up, that the mission in Zurich had been accomplished and that it was up to Leahu to see that the contractors' estimates were paid so that the "money could flow" (Tr. 1028). Petitioners' presence during and participation in the Palmer House meeting and their subsequent actions were sufficient to establish that they agreed to an over-all conspiracy not only to commit bribery but also to accomplish a wide-ranging number of objectives including fraud and tax evasion.

Contrary to the contention of petitioners, it does not matter that they did not directly participate in all the acts of fraud proved at trial. In order to convict for conspiracy, it is only necessary to show the defendants knowingly agreed to a mutual undertaking to accomplish an unlawful scheme. *Kotteakos* v. *United States*, 328 U.S. 750, 754-755 (1946). As the Second Circuit explained in *United States* v. *Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944), when a person "embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them." See also *Blumenthal* v. *United States*, 332 U.S. 539, 556-558 (1947).

2. A number of other contentions raised by petitioners fall with their first claim.

(a) Petitioners Fitzgerald (78-396 Pet. 8-12) and Kovach (78-398 Pet. 18-24) argue that their motion

for severance should have been granted because the evidence did not show they participated in all aspects of the conspiracy. Since, however, the evidence showed that petitioners were well aware of the over-all scope of the conspiracy to which they agreed and therefore were accountable for the actions their co-conspirators took in furtherance of it, severance was not required. See Rule 14, Fed. R. Crim. P.; *Shaffer* v. *United States*, 362 U.S. 511, 514-517 (1960); *Opper* v. *United States*, 348 U.S. 84, 95 (1954).

Accordingly, this case is clearly distinguishable from *United States* v. *Kelly*, 349 F.2d 720, 756-759 (2d Cir. 1965), holding that severance should have been granted because a very weak case against one defendant was unfairly bolstered by "spill-over" from the proof against much more clearly culpable defendants.

(b) Petitioner Leahu's argument (78-5313, Pet. 15-17) that the mailings involved in Counts II through VI were not in furtherance of the scheme to defraud in which he was involved (allegedly ending in June 1971) is likewise without merit. These mailings were clearly in furtherance of the over-all scheme in which petitioner was involved.

All of the mailings charged in the indictment were from ITAG in Switzerland to the East Chicago, Indiana post office box of Hernly Brothers, Inc., and all were received during the time that Hamilton, Schubert, and Leahu continued to exercise fiduciary authority over the project. All invoices for payment were

entered into the ITAG books as payments due to ITAG (Tr. 5716, 5733, 5831; Gov't Exh. 53B). All of the ITAG invoices, including these mailings, were intended from the outset as a means to generate and conceal a fund in Switzerland which would "launder" and transmit bribes, kickbacks, and other payments to the conspirators. Each of the mailings was therefore a fraudulent act designed to create the appearance that the ITAG corporation was a legitimate subcontractor on the project which was providing legitimate services and billings and being paid in a routine business manner. This appearance was essential if the conspirators were to realize the fruits of their scheme while any one of them maintained his professional relationship to the project. Each mailing was therefore "incident to an essential part of the scheme" and satisfied the requirements of the mail fraud statute. See *Pereira* v. *United States*, 347 U.S. 1, 8 (1954).

The critical nature of the use of the mails makes this case distinguishable from those on which petitioner relies. In *Kann* v. *United States*, 323 U.S. 88, 94 (1944), this Court held that where the defendants had fraudulently cashed a check and obtained the proceeds directly from a bank in one transaction, the fact that the check was subsequently mailed to the drawee bank for collection did not by itself make the use of the mails a component of the fraudulent scheme. Similarly, in *United States* v. *Maze*, 414 U.S. 395 (1974), and *Parr* v. *United States*, 363 U.S. 370 (1960), the fraudulent use of credit cards was

held not to constitute an offense under 18 U.S.C. 1341 where the only use of the mails proven was that the credit card bills were eventually sent to the cardholder. In this case, in contrast to *Kann* and *Maze*, the scheme depended on the role played by the mails in the collection of the illicit profit.

(c) Nor is there any substance to the claim—advanced by petitioner Leahu (78-5313 Pet. 12-15) with respect to his convictions on the conspiracy count (Count I) and the five substantive counts of mail fraud (Counts II-VI) and by petitioner Kovach (78-398 Pet. 17-18) with respect to his conviction for conspiracy (Count I)—that their prosecution was barred by the statute of limitations, 18 U.S.C. 3282, because their involvement in the scheme ended in June 1971, more than five years before the September 1976 indictment was issued. In fact, petitioners' involvement did not end then, and as the court of appeals noted in respect to the conspiracy count (Pet. App. A9), there were a number of overt acts charged (including Hinesley's traveling to Switzerland on November 5, 1971, to obtain $35,000 in ITAG funds, $25,000 of which he paid to Schubert, as well as the Columbine venture which lasted until late 1972) that took place within the limitations period and which the jury, having been instructed on the need to find an overt act during the five years before the indictment (Instruction 22), could have found were in furtherance of the conspiracy. Moreover, each of the mailings alleged in the five substantive counts (78-5313 Pet. 15) was well within the five-year statute of limitations.

3. Petitioners Hamilton, Schubert (78-340 Pet. 11-13) and Fitzgerald (78-396 Pet. 16-19) contend that the district court violated their Sixth Amendment right of confrontation by erroneously limiting their cross-examination of Hernly who had been granted immunity, when it sustained objections to petitioners' questions about the penalties Hernly was facing when he was given immunity. Although a defendant may not be deprived of the right to "effective" cross-examination when he is attempting to show bias on the part of a government witness (*Davis* v. *Alaska*, 415 U.S. 308, 315-16 (1974)), this right is not unlimited, and a trial court's discretionary determination limiting cross-examination will not be subject to reversal absent a showing of an abuse of discretion. *United States* v. *Bastone*, 526 F.2d 971, 981 (7th Cir. 1975), cert. denied, 425 U.S. 973 (1976). Here the court of appeals correctly concluded that "the jury had sufficient information to make a discriminating appraisal of the witness' motives and bias" (Pet. App. A13). Hernly's eleven day testimony included exhaustive cross-examination on his receipt of immunity, government payment of his subsistance expenses, both his personal and corporate liability for civil tax assessments and fraud penalities, personal tax liability, his attempts to obtain immunity for his Swiss associates, as well as his remaining investment interests resulting from the scheme. Under these circumstances, the court of appeals properly concluded that Hernly's testimony

during cross-examination provided sufficient information to the jury to expose his possible motives and bias. See *United States* v. *Miles*, 480 F.2d 1215 (2d Cir. 1973); *United States* v. *Blackwood*, 456 F.2d 526, 530 (2d Cir. 1972), cert. denied, 409 U.S. 863 (1973); *United States* v. *Campbell*, 426 F.2d 547, 550 (2d Cir. 1970); see also *United States* v. *Mayer*, 556 F.2d 245, 250 (5th Cir. 1977); *United States* v. *Garrett*, 542 F.2d 23, 25 (6th Cir. 1976).

4. Petitioners Hamilton, Schubert (78-340, Pet. 8-11), and Leahu (78-5313 Pet. 17-18) contend that certain comments in the prosecutor's closing argument required reversal of their convictions.[4]

(a) Petitioners Hamilton and Schubert complain that the following comment by the prosecutor improperly suggested that Hernly was telling the truth because he had been granted immunity (Tr. 7106):

> Now, it's a problem. And I think we've, well, we've all lived through these last years, and there's a lot of controversy about immunities. It's no secret. Its a very difficult process. But how do you find out about crimes like this unless you grant someone immunity? Further, as to the distastefulness of what we did, this immunity was granted by a Federal Judge upon petition of the Government. If there was something illegal or unethical about it, do you suppose it

[4] The statements which petitioners' challenge, were not objected to during the course of the prosecutor's rebuttal argument. Objections were raised only after the jury left for deliberations.

> would have happened? Do you suppose you would have been here hearing Hernly's testimony? We know you wouldn't have, but the fact of the matter is, you did. You can't ignore any of the testimony in this case. You've got to consider it all, weigh all the factors, and after you do that, if you find you absolutely can't believe somebody, then throw his testimony out. But the fact that he's been granted immunity is not a factor which will deny us the right to use a man's testimony, particularly when its been granted by the Federal Judges as it has in this case.

As the district court noted (Tr. 7178) these comments were addressed to petitioner Hamilton's argument that if the jury disapproved of the grant of immunity, they were entitled to view the evidence which resulted from it as suspect and acquit (Tr. 7092-93). The comments therefore correctly explained the necessity of granting immunity to uncover criminal conduct. Viewed in this light, the comments were not improper and could not have misled the jury.[5]

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[5] The cases upon which petitioner relies involved situations where the prosecutor's comments could be construed as implying that "the Government witnesses were telling the truth because district court judges had independently seen fit to grant them immunity." *United States* v. *Hollinger*, 553 F.2d 535, 548 (7th Cir. 1977). See also, *e.g.*, *In Re Daley*, 549 F.2d 469 (7th Cir. 1977); *Thompson* v. *Garrison*, 516 F.2d 986 (4th Cir. 1975), cert. denied, 423 U.S. 933 (1975); *In Re Grand Jury Investigation*, 486 F.2d 1013 (3d Cir. 1973). That obviously was not what happened here where the prosecutor's comments were directed to rectifying an improper implication of the defense.

(b) Petitioner Leahu argues that the following comments of the prosecutor violated his right against self-incrimination (Tr. 7139):

> [As] I told you before, just because Mr. Leahu gets his million dollars doesn't mean he can blithely walk away from this conspiracy and say: 'I am not involved in this any more. I got my money.'
>
> He can't do that. He didn't do it in this case. He got his money and that's all he did. He kept his mouth shut * * *.

Petitioner argues these statements amounted to a comment on his failure to testify at trial and were therefore prejudicial error because the jury could infer that he was under a duty to explain where the illicit money went. The district court properly concluded that "* * * it didn't appear * * * that the government attorney was arguing that the defendants were failing to take the stand" (Tr. 7176). In context, the challenged portion of the prosecutor's argument simply asserted that petitioner was responsible for the acts of his co-conspirators in the overall scheme and obviously were not "* * * of such a character that the jury would naturally and necessarily take it to be a comment on the defendants' failure to testify." See *United States* v. *Lyon*, 397 F.2d 505, 509 (7th Cir.), cert. denied, 393 U.S. 846 (1968).

5. Finally, petitioners Hamilton, Schubert (78-340 Pet. 13-14), Fitzgerald (78-396 Pet. 12-19), and Leahu (78-5313 Pet. 18-24) contend that the

courts below erred in determining that petitioner Leahu was a "bribeable official" under Indiana law, which makes it unlawful to bribe any "employee of a political subdivision" of Indiana or any person holding "any lucrative office, or appointment or agency under the Constitution or any law of the State of Indiana for the purpose of procuring [a] public contract * * *." They argue that they could not be convicted under Count I of the indictment charging conspiracy with use of interstate facilities to bribe "because an Indiana sanitary district is not a municipal corporation within the meaning of the two percent tax limitation provision of the Indiana State Constitution," and therefore petitioner Leahu as Superintendent of the Board was not an employee of a political subdivision of the State of Indiana.

As the court of appeals noted, relying on the Indiana courts' interpretation of their own laws, petitioners' contention lacks merit (Pet. App. 10):

> The Indiana legislature did not intend to create an entity separate from municipalities when it created sanitary districts. See *Archer* v. *City of Indianapolis*, 233 Ind. 640, 122 N.E. 2d 607, 610-11 (1954). Like the chief of police and other department heads appointed by the mayor, Leahu was a public officer and an employee of the municipality. *See State* v. *Carey*, 241 Ind. 692, 175 N.E. 2d 354 (1961); *Klink* v. *State ex rel. Budd*, 207 Ind. 628, 194 N.E. 352 (1935); *Archer*, *supra*. As such, he was a bribeable official under Indiana law.

There is thus no reason for this Court to review this contention. See *Saltonstall* v. *Saltonstall*, 276 U.S. 260, 270 (1928).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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